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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. [redacted] 1887

SCHERER & SONS, INC.,
a Florida corporation,

Petitioner

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, LOCAL NO. 415, AFL-CIO, and FLORIDA APPAREL MANUFACTURERS' ASSOCIATION, INC., a Florida corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on February 15, 1965.

OPINION(S) BELOW

The memorandum opinion of the Court of Appeals for the Fifth Circuit is reported in 341 Fed. 2d 298 and is printed in the Appendix* hereto, infra, (A:1-(i)). The

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* A = Appendix.

findings and conclusions and final judgment of the district court are contained in the Record on pages 558-564 and the Petitioner's specifications of error thereto are contained in the Petitioner's brief (brief of the Appellant filed in the Court of Appeals) on pages 9 through 22, inclusive (the Petitioner's brief as Appellant, in the Court of Appeals, the Respondent's brief as Appellee, and the reply brief of the Petitioner, all filed in the Court of Appeals, have been certified by the Clerk of the Court of Appeals for the Fifth Circuit and have been made a part of this Record and/or as exhibits thereto, pursuant to the practice permitted by this Court.

JURISDICTION

The judgment of the Court of Appeals was entered on February 15, 1965, (A-(ii); a timely petition for rehearing was filed on March 4, 1965. Rehearing was denied on March 19, 1965 (A-(i)). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Among other things, the collective bargaining agreement(s) between the International Ladies' Garment Workers' Union, Local 415, AFL-CIO, and the Florida Apparel Manufacturers' Association, Inc. (which consisted of employers who manufacture and produce ladies' dresses, and other garments), and between the Respondent Union and other employers, not members of the Association, contain a provision that those in contract with Local 415 shall not have accessories manufactured by a shop/manufacturer/contractor whose employees are not covered by a collective bargaining agreement with the

Union, in this instance: the Petitioner, Scherer & Sons, Inc.; and this, of course, is material insofar as one of the questions presented is concerned. The following questions are presented:

1. Whether a labor union, under the guise of acting in its own self-interest and/or the interests of its members, may aid and abet the employer(s) in a conspiracy to stifle competition and restrain trade in the manufacture, sale, use or consumption of merchandise, and is a controversy concerning the same within the exemption of the Sherman Anti-Trust Act?

2. Whether a labor union may be held as a conspirator under the Sherman Anti-Trust Act where it has achieved a multi-employer collective bargaining agreement, and individual bargaining contracts, which contracts provide that such manufacturers shall not give out work to "non-Union shop or shops" (R. 336)** that is to say, is such a contract provision an exemption from the Sherman Anti-Trust Act?

3. Whether the exemption provided for the garment industry under Section 8(e) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C.A. 158(e) is constitutional?

** R = Record before this Court.

4. Whether the district court, in view of the uncontradicted testimony (R: 11, 12, 16, 22, 27-29, 31-35, 37, 101-103, 106 107, 111, 116, 118, 128, 132-151, 155-169, 170-180, 195, 196, 231, 263, 270, 275, 277, 336, 449, 500, 503) misapplied and/or misapprehended the provisions of the Sherman Anti-Trust law(s) as construed in the case(s) of **Allen Bradley v. Local 3, etc.** (1945) 325 U.S. 797, 65 S. Ct. 1533 and **U. S. v. Women's Sportswear Mfrs. Ass'n.**, 336 U.S. 460 (1949)?

5. Whether the Court of Appeals for the Fifth Circuit erred in its refusal, as an appellate court, to overrule the clearly erroneous findings of the district court in an anti-trust action, as in other civil actions tried by a district judge without a jury?

6. Whether the courts below erred in their decisions, and further erred in their refusal to make a determination of the constitutional question presented in that they failed to recite any basis for such refusal?

STATUTES INVOLVED

The statutory provisions involved are the pertinent provisions of the **Sherman Anti-Trust Act** (26 Stat. 209, 15 U.S.C. 1 et seq.), the **Clayton Act** (38 Stat. 730, 15 U.S.C. 12, 13, 14, 15, 26 and 28 U.S.C.A. 2201) and the Labor Management Relations Act of 1947, as amended, 29 U.S.C. 158(e).

STATEMENT UNDER RULE 33(2)(b)

Since the proceeding draws into question the constitutionality of 29 U.S.C. 158(e), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. Section 2403 may be applicable.

No court of the United States as defined by 28 U.S.C. Section 451 has, pursuant to 28 U.S.C. Section 2403, certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question.

A copy of this petition is, therefore, being served upon the Solicitor General of the United States, Department of Justice, Washington, D. C.

STATEMENT OF THE CASE

This cause was instituted by Scherer & Sons, Inc., Petitioner herein, against International Ladies' Garment Workers' Union, AFL-CIO, its affiliated Local 415, some of the Local's officers and representatives,[1] and the Florida Apparel Manufacturers' Association, Inc. The complaint alleged that the Respondents conspired and contracted together to destroy the Petitioner's business and thereby to restrain trade and commerce in violation of the Federal anti-trust laws, commonly known as the Sherman and Clayton Acts. Petitioner is a producer of

[1]Only the Petitioner, the Association and the Union remain as parties to the cause. The parties will be referred to as Scherer, the Association and the Union (or Local 415).

belts and accessories which are attached to ladies' dresses, and contracts to provide same to manufacturers and jobbers of ladies' dresses and sportswear in the Miami area. Many of the manufacturers with whom Petitioner has done business are members of the Association which has a collective agreement with the Union.

The complaint (R: 291-307), originating as an action for Declaratory Decree and other Relief on October 22, 1962, among other things, sets out, with specificity, the following:

(a) That Scherer employs many people none of whom it is informed is a member of Local 415, International Ladies' Garment Workers' Union or Florida Apparel Manufacturers' Association, Inc., Appellees (R: 294) . . . . . all admitted by the Appellees herein;

(b) That the Appellee International Ladies' Garment Workers' Union AFL-CIO, Local 415 (hereinafter referred to as the **Union**) and the Appellee Florida Apparel Manufacturers' Association, Inc., (hereinafter referred to as the Association) entered into contracts, **which, together with other activities, are for the purpose of causing the destruction of Scherer's business, carrying out restriction in trade or commerce, preventing competition in the manufacturing, making, transporting, sale and/or purchase of goods produced for sale in commerce** all in violation of the "Clayton Act"

and the "Sherman Act" as alleged in Paragraph 1 of the Complaint (R:295);

(c) That by these acts including the execution of the Supplemental Agreement, and more particularly Paragraph 6 thereof, (R: 336) Scherer's rights are violated in that his contractual rights are impaired for that Scherer was denied equal protection and for that Scherer was denied equal protection and due process as provided by the Fifth and Fourteenth Amendments to the Constitution of the United States of America, and further in the violation of Section 17 of the Declaration of Rights of the Constitution of the State of Florida (R: 295);

(d) That the Appellees engaged in a conspiracy to discriminate and substantially to lessen competition or tend to create a monopoly in commerce and to injure, destroy and prevent competition in commerce, and by the execution of contract(s) and of the acts alleged in the Complaint, did substantially lessen competition, tend to create a monopoly and destroy and prevent competition in commerce within the meaning of the anti-trust laws invoked in the Complaint (R:297);

(e) Scherer lost large sums of money because of the acts complained of (R:299-301);

(f) Scherer also alleged that the provision(s)

of the Labor-Management Relations Act of 1947, as amended, commonly referred to as the Taft-Hartley Act, which grant(s) to the garment industry an exemption which provides in Section 8(e), or more specifically U.S.C.A. 158(e) thereof, that nothing in the Taft-Hartley Act shall prohibit the enforcement of any agreement such as that contained in Paragraph 6, of the Supplemental Agreement of October 25, 1960 (R: 336) is unconstitutional (R: 302) this allegation contained in Paragraph 12 of the Complaint (R: 301) was stricken by order of the Court on December 10, 1962 (R: 410) . . . . . , even though, on the same date, the Court by order stayed all proceedings for 10 days at the behest of the union to allow an appeal to this Court on the premises that the issues as limited in Paragraph 6 of the same order (R: 409) involving a controlling question of law as to the validity, constitutionality, of Section 29 U.S.C.A. 158 (e); see (R: 408); oddly enough after failure of the union to present the question certified, a like opportunity was denied Scherer (R: 423) upon its motion (R: 420) for certification of the same question on Interlocutory Appeal; furthermore the Court also struck (R: 410) Paragraph 7 of the Complaint which alleges a continuing violation of the anti-trust laws (R: 296), although Scherer as a basis for such allegations relied upon **Clark vs. United States** 281 F.2d 443 (CA 9);

(g) That the activities of the Appellees are compulsive pressures, and constituted primary or secondary pressures by the Appellees upon Scherer for the purpose of compelling Scherer to execute a contract with the defendant union as a condition of employment even though none of Scherer's employees are members of the union, all in violation of the Florida "Right to Work Amendment" found in Section 12 of the Declaration of Rights of the Florida Constitution, all of which was construed by the Supreme Court of Florida in concert with and application of 29 U.S.C.A. 164(b) as unlawful and tantamount to the taking of Scherer's property without due process and, activity in violation of public policy. Citing **Scherer & Sons, Inc., vs. International Ladies' Garment Workers' Union, et al.,** (Florida 1962) 142 So.2d 290 (R: 303-305)(this allegation(s) was stricken (R: 410) as were other allegations in the Complaint).

The order striking portions of the Complaint (R: 410), like other errors was assigned as error and is contained in Statement of Points (R: 594).

This cause ultimately evolved into litigation between Scherer, as plaintiff, and the Association and the Union, as defendants; all other named defendants were either dropped as defendants or failed to be parties defendant because of lack of service of process. The Complaint

sought, among other things, treble damages, costs and attorney's fees.

Local 415 filed a Motion to Dismiss (R: 343), claiming among other things (1) that the subject matter of the cause had been preempted by Congress to the exclusive jurisdiction of the National Labor Relations Board by the National Labor Relations Act, as amended (29 U.S.C.A. Sec. 141, et seq.); and (2) that the complaint failed to state a claim upon which relief could be granted.

The District Court denied the Motion (R: 407-409), whereupon Defendants filed their Answers (R: 339-343, 411-418), admitting their contractual relationship, but denying the commission of any conduct violative of the anti-trust laws.

The cause proceeded to trial before the Court sitting without a jury on the single issue, viz. (R: 409):

> "... whether the Local Union, by entering into Paragraph 6 of the Supplemental Agreement of October 26, 1960,[2] or by other acts and conduct, aided and abetted the members of Defendant, Florida Apparel Manufacturers Association, Inc., in the latter's alleged conspiracy to stifle competition and restrain trade in the manufacture, sale, use or consumption of merchandise."

Paragraph 6 of the Supplemental Agreement of October 25, 1960, reads as follows (R: 336):

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[2]Correct date: October 25, 1960.

"Belts, covered buttons, buckles, neckwear, artificial flowers, embroideries, hemstitching, pleating and tucking on garments etc., which are caused by members of the Association to be manufactured for them shall be made only by workers covered by collective bargaining agreements with the union, the International or affiliates thereof. In case a member of the Association shall have this work done by a non-union shop, then, upon notification by the union of this fact, the Employer shall discontinue to give out such work to such non-union shop or shops."

After hearing all the evidence and the arguments of counsel, the Court filed its Findings of Fact and Conclusions of Law (R: 557-563).

Final Judgment was entered dismissing the complaint with prejudice (R: 564), from which Plaintiff below has effected this appeal (R: 583).

The Petitioner's motion for a new trial (R: 564-578), supported by memorandum (R: 578-582) was denied (R: 582-583) and the Petitioner thereafter appealed to the Court of Appeals for the Fifth Circuit.

Because of its materiality Scherer sets out here the provisions of the exemption, previously referred to, as contained in 29 U.S.C. 158(e) which reads as follows:

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or

agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible (sic) and void: . . . Provided further, that for the purposes of this subsection and subsection (b)(4)(B) of this section the terms 'any employer', 'any person engaged in commerce or an industry affecting commerce', and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer', 'any other employer', or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, that nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception."

It must be remembered, also, that this *exemption* is/was the object and substance of the question certified for Interlocutory Appeal (R: 408) at the request of the Union . . . . . yet, never implemented.

The Findings of Fact and Conclusions of Law of the district court are clearly erroneous and, under the circumstances, when such a mistake has been committed, even though there may be evidence to support such a finding(s), a review in court must set such findings

aside, as is held in **McAlister v. United States** (1954), 348 U.S. 19, 20, 75 S.Ct. 6, 8. It is the obligation of an appellate court to overrule clearly erroneous findings of a district court in an anti-trust case when an examination of the entire evidence makes it obvious that a mistake has been committed. This has been made clear recently in **Associated Press v. Taft-Ingalls Corporation** (1965) 340 Fed. 2d 753. Petitioner, in its statement of points. (R: 584-597) clearly points out the errors committed by the district court and re-stated, in its brief to the Court of Appeals for the Fifth Circuit, the same under the section entitled Specifications of Error, as is seen by reference to pages 9 through 22 of said brief. Moreover, the district court, and subsequently, the Court of Appeals, refused to rule on the constitutionality of 29 U.S.C. 158(e) or its application to the issue(s).

It is the view of the Petitioner that if the union does the things described for the purpose of promoting the interest of a business group with the hope and expectancy that the trade of competitors, outside the business group, will be restrained or utterly destroyed (as directed toward Scherer), then the acts of the union would constitute a violation of the Sherman Act. See: **United States v. Women's Sportswear Mfg. Ass'n et al** (1949) 336 U.S. 460, 69 S. Ct. 714.

Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services. The same labor union activities may, or may not, be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups. **Allen Bradley Company v.**

Local Union No. 3 (1945), 325 U. S. 797, 89 L. Ed. 1939; **United Brotherhood of Carpenters v. United States** (1947), 330 U. S. 395, 91 L. Ed. 973; **Los Angeles Meat and Provision Drivers Union v. United States** (1962), 371 U. S. 94, 9 L. Ed. (2) 150; **United States v. Gasoline Retailers Association, Inc. et al.** (1961, 7th Cir.), 285 Fed. 2d 688; **Local 175 Brotherhood of Electrical Workers v. United States** (1955, 6th Cir.), 219 Fed. 2d 431; **Philadelphia Record Company v. Manufacturing Photo-Engravers Assoc. of Philadelphia** (1946, 3rd Cir.), 155 Fed. 2d 799; **Anderson-Friberg, Inc. v. Justin R. Clary & Son** (1951, S. D. N. Y.), 98 Fed. Supp. 75. If these factors are present (as they are in this case), then merely calling the act of the Union an effort to stabilize wage rates would not remove the Sherman Act prohibitions.

In the case of **Jewel Tea Company v. Associated Food Retailers of Greater Chicago, Inc. etc.,** (1964) 331 F. 2d 547 (C.A. 7)*, the Court stated, on page 549 of its opinion:

> "As long as all rights of employees are recognized and duly observed by the employer, including the number of hours per day that any one shall be required to work, any agreement by a labor union, **acting in concert with business competitors of the employer, designed to interfere with his operation of a retail business, engaged in handling products in the course of interstate commerce, is a violation of the Sherman Act, and not entitled to the exemption therefrom claimed by the defendant unions in this case**" (emphasis ours).

(See also **Jewel Tea Company v. Local Union etc.,**

(1960) 274 F. 2d 217); in the above case* the Court held that a contract provision entered into in the self-interest of union members to attain or maintain conditions deemed by unions relevant to their membership's working welfare was not exempt from the Sherman Act; nor would the contract provision complained of herein (paragraph 6 of the Supplemental Agreement) be exempt from the Sherman Antitrust Act.

Scherer urges the Court that almost any single point contained in its Statement of Points on appeal (R: 584-597) is of such significance that it alone should warrant a reversal in this cause. Scherer did not abandon any of the points on appeal; such points as the Court's improper exclusion of testimony (R: 585) and its refusal to allow full and complete examination of Dr. Vadakin as set out in points numbers 8 and 19 respectively imposed restraints upon appellant unusual in antitrust suits. Petitioner urges the Court to examine with minuteness appellant's proposed findings of fact set out in point 16 (R: 586-592) and its proposed conclusions of law contained in point 18 (R: 592-593) with the view that upon any remand this Court direct the lower Court(s) to enter the same.

Petitioner with specificity re-refers to the case of **United States v. Women's Sportswear Manufacturers Association,** supra; that case turned on facts quite similar to those that exist in the case at bar. There the union had a contract with members of an employer association which required all the employer members to give all their work to employers (jobbers) who were in good standing with the International Ladies' Garment Workers Union. **The Supreme Court stated: "the manifest purpose and intent of the contract in question was to restrain the jobbers**

from free choice among stitching contractors on equal terms" and therefore was violative of the Sherman Anti-trust Act.

From the inception it has been implied in all of the respondents' argument(s) that the contract is outside the scope of the anti-trust laws because it was/is the end product of banter back and forth over a bargaining table between a union and employers. This argument is of no avail, for it has been repeatedly held the fact that an anti-trust violation allegedly stems from operation of a collective bargaining unit does not mean that the National Labor Relations Board has exclusive jurisdiction (as once herein contended by the appellees) for as held in **Jewel Tea Company v. Meatcutters Local 189,** CA 7 (1960) 274 F.2d 217, jurisdiction of a Federal District is invoked and attaches in such a case **when the complaint alleges an unlawful conspiracy between employer association and a union to suppress competition in trade.** Nor, as has the Union incessantly contended, is the case of **United States v. Hutcheson** 312 U. S. 219 (1941) any defense, for that case held that a union is not within the purview of the Sherman Act only "so long as a union acts in its self-interest **and does not combine with non-labor groups."** In short where a union contracts with employers (e.g. non-labor groups) and the contract **on its face** shows that the purpose thereof is to eliminate a non-member from the competitive market, anti-trust laws are applicable in spite of the fact a union was involved and the contract was in the form of a collective bargaining agreement, any other provisions of any act(s) of Congress notwithstanding.

The exercise of the asserted right to engage in asso-

ciation collective bargaining is the exercise of tremendous if indeed not awesome, power; with such power comes responsibility in preserving, rather than destroying, the free flow of commerce. This should be particularly true in industries where they have a great number of competing companies, operating in all kinds of different conditions with all sorts of methods of production, and where there arises a tendency, favored by the union, to eliminate competition. **Were the respondents to have their way, the market would be eliminated for those companies that operate under conditions that make it impossible to survive under other conditions imposed by this union,** *which already says that it won't sign up others except on the terms insisted upon by the Association (see Keherer's testimony,* R: 277).

Scherer does not undertake to say in this case that the Union does not have the power to engage in association or area-wide collective bargaining; nor is it desirous of denying to the Union, in any way, the legitimate exercise of its rights and duties, **but Scherer does demand equal protection under the law and the right to exercise its constitutionally guaranteed rights** and hence: paragraph 6 of the Supplemental Agreement of October 25, 1960 is violative of such rights and is therefore unlawful, illegal, void and of no force and effect.

Respondents, from time to time since the beginning, have relied on the provisions of section 158(e) of 29 U.S.C.A. (the exemption proviso contained in Section 8(e) of the Labor Management Relations Act of 1947, as amended) to give paragraph 6 of the Supplement (hereafter simply referred to as "paragraph 6") an aura of respectability and legitimacy; there is no question but

"paragraph 6" restricts the right of Scherer to do business and its application exerts secondary, indeed primary, economic pressures serious enough to result in the irreparable damage claimed and proven here; furthermore, for whatever persuasiveness may be had therefrom, the Supreme Court of the State of Florida, in a cause still pending, **Scherer and Sons, Inc. v. International Ladies Garment Workers' Union, etc.** (Fla., 1962) 142 So.2d 291 said of Scherer and "paragraph 6", respectively, on page 292 of the opinion, the following:

> **"It alleged and the District Court found that it proved that irreparable injury resulted from the agreement".**

The District Court referred to above is the District Court of Appeal for the Third District of Florida. Moreover the Florida Supreme Court found that "paragraph 6" if supported by evidence of its application, within the limitations stated by the Court, would collide head on with "the right to work" amendment, saying on page 295:

> Here appellant also asserts that the collective bargaining agreement collides with Florida's so-called "right to work amendment" found in Section 12, Declaration of Rights, Florida Constitution, F.S.A. This provision of the Florida organic law reads as follows:
>
> "The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right

of employees by and through a labor organization or labor union to bargain collectively with their employer."

It is then contended that state jurisdiction is preserved by 29 U.S.C.A. § 164(b) which reads as follows:

> **"Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or territory in which such execution or application is prohibited by State or Territorial law."**

Unfortunately for the appellant this aspect of the problem was neither urged by the complaint nor supported by the evidence presented to the chancellor on the application for the temporary injunction. Although the point was raised by a petition for rehearing in the District Court, it was not argued in the briefs nor supported by the record presented to that court.

. . . Conceivably, the secondary economic pressures exerted upon appellant by the disputed provision in the collective bargaining agreement could force appellant into a delemma which would be tantamount to a taking of its property without due process. It could be confronted by a situation where the only alternative to preserving itself against irreparable harm would be the compulsion to require its employees to join a

union as a condition to employment. Such compulsive pressures would then squarely present the Florida "right to work" issue. Certainly, if this situation could be supported by evidence upon a remand, then the Taft-Hartley recognition of permissible state concern in the enforcement of its right-to-work provisions would support state action. In the area of protecting state policy under right-to-work provisions the Congress has expressly ceded initial jurisdiction to the states. Since the matter was before the chancellor only upon an application for a temporary restraining order based upon the Florida restraint of trade statute, we feel that **upon remand the appellant should be accorded an opportunity to establish by evidence the applicability of Florida's right-to-work amendment if it so desires and is in a position to do so.** We, therefore, hold that when this cause is remanded to the chancellor it should be without prejudice to any rights of appellant in this regard. (emphasis ours)

Be that as it may, "paragraph 6" is in derrogation of Scherer's rights as guaranteed by the Fifth Amendment to the Constitution of the United States, as violative of both due process and equal protection under the law. And, in so far as Section 8(e) of the Taft-Hartley Law may authorize such a provision as "paragraph 6", or for that matter permit the claimed exemption contained in the Act, then and in that event, the exemption, that is to say Section 8(e), is unconstitutional . . . for the reasons above and hereinafter set out.

This is not the first time 5th Circuit was faced with Section 8(e) of the Taft-Hartley Act, **but is the only time the question of its constitutionality has been presented squarely under both the Fifth and Fourteenth Amendments as it is related herein**; this petitioner is not a labor union, unlike the lithographers in Employing Lithographers of Greater Miami, Florida v. N.L.R.B. etc., C.C.A.5, (1962) 301 F. 2d 20, infra.

Counsel for Respondent Union endeavors to make much of this case **of Employing Lithographers of Greater Miami, Florida, Petitioner, v. National Labor Relations Board, Respondent,** CA 5, 1962, 301 F. 2d 20. This case **does not** hold as counsel would have the Court believe that Section 29 U.S.C.A. 158(e) in its entirety is constitutional. The facts are different. It is a case of one union endeavoring, in unfair labor practice cases under the guise of protection of the Fifth Amendment, to obtain so-called benefits inuring under what is obviously an unconstitutional act unto the garment unions under that portion of the act following **"provided further . . ."** about which this Petitioner complains. In fact the court there construed the hot cargo provision of the act and held the following:

> "We hold that the exemption does not deny due process under the Fifth Amendment **to the members of the union** here. It may be that the lithographic workers can make a case for exemption but that is a matter that addresses itself under our system of government of the wisdom of the Congress. **In the meantime** we preserve the prescription of the statute, and the exemption to the garment workers." (Emphasis ours.)

In the instant case we have a claim based by a Petitioner other than a labor union not only on the rights guaranteed by the Fifth Amendment but upon equal protection guaranteed. In fact, in its above quoted opinion the court indicated that only in the meantime are they preserving the prescription of the statute and then only to members of another union not included in the **'provided further clause'.**

It is odd, and incongruous, that the state courts should find, in the Scherer case, supra, that the very thing to which the district court closed its eyes did and does indeed exist; only recently, to-wit: on March 12, 1965, the state court held, factually, that the activities complained of in this case (the same as complained of in the proceedings in the state court) did exist. The final decree and the order denying rehearing thereon are printed in the Appendix hereto and certified copies of the same accompany the Record.

REASONS FOR GRANTING THE WRIT

This case presents a construction of the Sherman Act and the cases construing the same where the activities of a union are alleged, and proven, to be in concert with employers in an illegal combination with the avowed purpose of eliminating competition. The decisions of the courts below in the instant case are directly in conflict with **Allen Bradley v. Local 3**, etc., supra, and **U. S. v. Women's Sportswear Mfrs. Ass'n.**, supra. While this conflict has not been conceded by the courts below, it, in truth and in fact, exists. Furthermore, the question is of such importance that there is similarly pending before this Court a like problem in the case of **Locals Nos. 189 et al.**, Peti-

tioners, versus **Jewel Tea Company, Inc.**, Respondent (Case No. 240 - October Term 1964).

The matter has been and is in dispute and must remain so until settled by this, the Supreme Court. Clearly the question presented is of such importance and plainly in the public interest that an answer by this Court must be had and it is not simply a matter of correcting an error in the decision(s) below but the determination of a conflict of tremendous importance, as can be seen from the recitations in the Statement of the Case, supra.

Additionally, there is the vital question of the constitutionality of the exemption contained in 29 U.S.C.A. 158(e) which the lower courts have here refused to resolve.

It must be remembered that this section of the Taft-Hartley law, supra, is not only incidental to the issues involved in this cause under the Anti-Trust Statutes, but, also, separately and independent therefrom is the question of the constitutionality of this Act, and a request for the determination thereof, as is contained in the Petitioner's (Plaintiff's) complaint and the prayer for relief (R: 305-306). The exemption contained in 29 U.S.C.A. 158(e) is, on its face, discriminatory and clearly denies unto this Petitioner-Appellant-Plaintiff, constitutionally guaranteed rights . . . . . as is set out in this petition and urged in the briefs filed in the appeal to the Fifth Circuit, which said briefs are made a part of this petition by reference as if fully set out herein. The practical import of all of the above and foregoing is readily discernible; with this Petitioner, like others, it is a question of survival.

CONCLUSION

For the reasons stated, this Petition for a Writ of Certiorari should be granted and Petitioner prays that the writ issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit and the case set down for oral argument.

Respectfully submitted,

JOSEPH A. PERKINS
Attorney for Petitioner
M-107 Biscayne Building
Miami, Florida 33130

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari was delivered to:

(a) HERBERT L. KAPLAN, ESQ.,
Attorney for Respondent, International Ladies' Garment Workers' Union, Local 415, AFL-CIO
1674 Meridian Avenue
Miami Beach, Florida

this _____ day of May, 1965.

(b) HERBERT B. MINTZ, ESQ.,
Attorney for Respondent, Florida Apparel Manufacturers' Association, Inc.
Biscayne Building
Miami, Florida 33130

this _____ day of May, 1965.

(c) HON. ARCHIBALD COX,
The Solicitor General of the United States
Department of Justice
Washington, D. C.

this _____ day of May, 1965.

_____
Counsel for Petitioner

APPENDIX A

OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21505

SCHERER & SONS, INC.,

Appellant,

versus

INTERNATIONAL LADIES' GARMENT WORKERS' UNION AFL-CIO, LOCAL 415, and FLORIDA APPAREL MANUFACTURERS' ASSOCIATION, INC.,

Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(February 15, 1965.)

Before TUTTLE, Chief Judge, RIVES, Circuit Judge, and SIMPSON, District Judge.

PER CURIAM: The findings of fact by the district court cannot be set aside as clearly erroneous. Rule 52(a) F.R.C.P. We agree with its conclusions of law. The judgment is therefore

AFFIRMED.

[TITLE OMITTED]

Before TUTTLE, Chief Judge, RIVES, Circuit Judge, and SIMPSON, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Scherer & Sons, Inc., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

February 15, 1965

Issued as Mandate:

App. 3

[TITLE OMITTED]

ORDER ON PETITION FOR REHEARING

Appeal from the United States District Court for the Southern District of Florida.

(March 19, 1965)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, RIVES, Circuit Judge, and SIMPSON, District Judge.

PER CURIAM:

The petition for rehearing filed by the appellant in this cause is hereby DENIED.

APPENDIX B

FINAL JUDGMENT

(Number and title omitted)

Filed: March 2, 1964.

The Court having entered its Findings of Fact and Conclusions of Law herein, it is, upon consideration,

ORDERED, ADJUDGED and DECREED that the Plaintiff has failed to sustain its burden of proof, and judgment be and the same hereby is entered in favor of the Defendants, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO LOCAL 415 and FLORIDA APPAREL MANUFACTURERS' ASSOCIATION INC. and against the Plaintiff SCHERER & SONS, INC., and the Plaintiff's cause is hereby dismissed with prejudice, and with costs to be taxed against the Plaintiff by the Clerk of this Court.

DONE and ORDERED in Miami, Florida, this 28th day of February, 1964.

S/ David W. Dyer
Chief Judge

APPENDIX C

15 USCA 1

Every contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears or the label or container of which bears the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law or public policy now or hereafter in effect in any State Territory or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement providing for the establishment or maintenance of minimum resale prices on any commodity herein involved between manufacturers or between producers or between wholesalers, or between brokers, or between factors, or btween retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 107 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not

exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2 1890 c. 647 § 1 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

15 USCA 2

Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court. July 2 1890, c. 647 § 2 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

15 USCA 15

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has a nagent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4 38 Stat. 731.

APPENDIX D

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY — IN CHANCERY NO. 61C-1417 (Dekle)

SCHERER & SONS, INC., a Florida corporation,
Plaintiff,

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, Local 415, et al.,
Defendants.

FINAL DECREE

The above cause came on for final hearing on Thursday, March 11, 1965, and the Court having heard the testimony, and being otherwise fully advised in the premises, finds:

1. That the equities in this cause are with the Plaintiff and against the Defendants, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, Local 415; INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO; MIAMI JOINT COUNCIL of the INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO; all unincorporated voluntary associations; JAMES BELLUSO, individually and as Business Agent of said International, and/or Local 415, and/or said Miami Joint Council; HARRY METZ, individually and as Business Agent of said International and/or said Local 415, and/or said Miami Joint Council; ROBERT GLAD-

NICK, individually and as Manager of said International and/or said Local 415, and/or said Miami Joint Council; and the FLORIDA APPAREL MANUFACTURERS' ASSOCIATION, INC., a Florida corporation.

2. That the Plaintiff has proven the allegations of the complaint, as amended, by and with clear and convincing evidence.

3. That the Plaintiff, and his employees, by the acts complained of in the complaint, and the conduct stemming therefrom, have suffered loss of earning in business and as wages and have been irreparably injured.

4. That the concerted activities of the Defendants complained of in the complaint, and the amendment thereto, are in violation of the Florida Right to Work Amendment, as is set out in Section 12 of the Declaration of Rights of the Constitution of the State of Florida, in that the acts complained of and the contract which is the subject matter of this suit, constitute both primary and secondary economic pressures by the Defendants upon the Plaintiff for the purpose of compelling the Plaintiff to execute a contract with the Defendant Union(s) and/or to require the Plaintiff's employees to join said Union(s) as a condition of employment, even though none of the Plaintiff's employees are members of said Union(s), or, in the alternative, to continue to suffer losses in its business with a likelihood of a cessation thereof, all of the above being within the purview of the law of the case in this cause of action, as is defined and set out in 142 So. 2d 290 and 163 So. 2d 306; see also **Hescom, Inc. v. Stalvey, etc.**, 155 So. 2d 3.

5. That the compulsive pressures brought to bear upon the Plaintiff, and [sic] its employees, by the Defendants, acting in concert, violate the Right to Work Amendment to the Constitution of the State of Florida, as aforesaid, and are tantamount to the taking of the Plaintiff's property without due process of law.

It is thereupon CONSIDERED, ADJUDGED, DECREED and ORDERED as follows:

1. That the Defendants, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, Local 415; INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO; MIAMI JOINT COUNCIL of the INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO; all unincorporated voluntary associations; JAMES BELLUSO, individually and as Business Agent of said International and/or said Local 415, and/or Miami Joint Council; HARRY METZ, individually and as Business Agent of said International and/or said Local 415, and/or said Miami Joint Council; ROBERT GLADNICK, individually and as Manager of said International and/or said Local 415, and/or said Miami Joint Council; and the FLORIDA APPAREL MANUFACTURERS' ASSOCIATION, INC., a Florida corporation, be, and they are hereby permanently enjoined and restrained from, in any manner, violating the Florida Right to Work Law(s), that is to say the provisions of Section 12 of the Declaration of Rights of the Florida Constitution appertaining thereto, including, but not limited to, the enforcement of any agreement, written, oral or otherwise, restraining or attempting to restrain the Plaintiff in its pursuit of business and its production, sale, use or consumption of merchandise, or from, in any manner enforcing an agree-

ment, written, oral or otherwise, between the Defendants and other customers of the Plaintiff which requires the cessation of, or failure to do business with the Plaintiff.

2. That the Defendants, and each of them, be and they are hereby restrained from any and all picketing in violation of the provisions of the above and foregoing paragraph one (1) and/or in any violation of the provisions of Section 12 of the Declaration of Rights of the Constitution of the State of Florida pertaining to said Right to Work Law.

3. That the costs in this cause are taxed against the Defendants.

4. That the Court retains jurisdiction of this cause for the purposes of entering such further and other orders as it may deem meet and proper to enforce the provisions of this final decree and effect the purposes thereof.

DONE and ORDERED in Chambers at Miami, Dade County, Florida, this 12 day of March, 1965.

HAL P. DEKLE

Circuit Court Judge

STATE OF FLORIDA)
COUNTY OF DADE)

This Copy is a true Copy of the Original on file in this Office. WITNESS my hand and Official Seal, This 17th day of March A.D., 1965.

E. B. LEATHERMAN,
Clerk Circuit Court

By MARION GRUBB, D.C.

[TITLE OMITTED]

ORDER

THIS CAUSE came on duly for hearing before me, after notice, upon the Defendants' Petition for Rehearing and Motion to Vacate and Set Aside Final Decree. The Court heard arguments, considered memoranda of law submitted and the authorities cited by the respective parties.

Nellie Kitchens, et al., vs. **John Doe, et al.**, (Fla.App. 3, March 16, 1965) _____ So.2d _____ (Opinion filed March 16, 1965, not yet reported) handed down after the entry of this Court's Final Decree of March 12, 1965, is urged by Defendants as decisive of this controversy and requiring that such Final Decree be set aside, and one entered for Defendants on the basis that the Taft-Hartley Act has preempted, to the exclusive jurisdiction of the National Labor Relations Board, the question(s) here as an unfair labor practice, on the ground that the right to work issue under Section 14(b) of Taft-Hartley begins only with actual negotiation and execution of the type of agreement described in Section 14(b), to-wit: "Agreements requiring membership in a labor organization as a condition of employment" as held in **Retail Clerks v. Schermerhorn**, 376 U.S.96, 11 L.Ed.2d 179, 84 S.Ct.219.

It does not appear that the right-to-work question has been presented in just this light in any of the previous cases. **Nellie Kitchens** involves, as plaintiff's, the employees of the Plaintiff here, Scherer & Sons, Inc., and the picketing in question which was solely by members of Defendant Union, not employees of Plaintiff. The hold-

ing of the Third District rests squarely on its statement that in the **Nellie Kitchens** case " . . . there was no agreement in existence, nor was there any negotiation in regard thereto, it was simply an attempt **to get the employer to execute a union-security agreement,** . . . ." There is present in evidence in this cause an agreement, in fact, agreements, which have the effect, under the proofs in evidence, of depriving the employees of this Plaintiff of the choice whether to join a union or not, as preserved in Florida's "right to work" law, which choice is recognized in **Schermerhorn,** supra. These agreements were between the Garment Workers' Union and apparel manufacturers in the Miami area as an Association, which is also a Defendant, and constituted a source of work done by the Plaintiff in the manufacture of belts, buttons and accessories for the products of such manufacturers, and thus, effectively eliminated work which the employees might do only if they conformed to the requirements of the agreements between the Association of Manufacturers and the Union that such products ". . . shall be made only by **workers** covered by collective bargaining agreements with the Union, the International or affiliates thereof." (Emphasis supplied) The agreements then continued: "In case a member of the Association shall have this work done by a non-Union shop, then, upon notification by the Union of this fact, the Employer shall discontinue to give out such work to such non-Union shop or shops." (Par. 6, p. 3, of Agreement, Pltf's. Ex. 4) Such provision expressly affects the "workers" or employees of the Plaintiff and, in effect, required that they belong to a union or no work would be received in the shop in which they worked and thus they were denied the right preserved by the Florida "right to work" law. The effectiveness of the agreement is demonstrated by the fact that this business quite

literally became a "closed shop", without business and the employees without work.

This situation is referred to in the opinion of Justice Thornal in the prior appeal in this cause, **Scherer & Sons, Inc. v. International Ladies' Garment Workers' Union, et al.,** (Fla. 1962) 142 So.2d 290, where he stated, at page 295:

> "It (plaintiff-employer) could be confronted by a situation where the only alternative to preserving itself against irreparable harm would be a compulsion to require its employees to join a union as a condition of employment. Such compulsive pressures would then squarely present the Florida "right to work" issue. Certainly, if this situation could be supported by evidence upon a remand, then the Taft-Hartley recognition of permissible state concern in the enforcement of its right to work provisions would support state action. . . ."

The evidence in this cause certainly supports this situation.

Thus, it is seen that in the present case there is such an agreement referred to in the **Nellie Kitchens** case which distinguishes it and supports state action under the "right to work" law, consistent with the language of Mr. Justice Douglas in **Retail Clerks v. Schermerhorn,** supra, which is quoted in the Nellie Kitchens opinion, distinguishing picketing in order to get an employer to execute an agreement and one where an agreement is in existence. It is true that the agreement here referred to is not directly between this employer and the Union, but it need not be where the agreements that have been executed

have the same effect indirectly precluding the right of choice of Plaintiff's employees with regard to joining a union or not. This accompished dilemma is set forth in Justice Thornal's earlier quoted language. To require, as a prerequisite to state action, the perfunctory execution of a union contract between this employer and this Union would be an idle and repetitious act. The result here is the same. The Union may be said to be doing indirectly that which the right to work law prohibits doing directly by such a "direct" agreement. It is very plain, from all of the foregoing, that these employees, by the Union's action and/or picketing, are being and/or would be compelled against their will to join a union in violation of the right to work issue. It is either that or no work. There is no specification as to between whom the agreements requiring membership in 14(b) of Taft-Hartley must be executed. Of concern to the Court is the effect of these upon the employees involved, and this effect is clear.

Accordingly, Defendants' Petition for Rehearing and Motion to Vacate and Set Aside Final Decree are denied and the Final Decree entered herein on March 12, 1965 is affirmed in all respects.

DONE and ORDERED at Miami, Dade County, Florida, this 6 day of April, 1965.

HAL P. DEKLE

Circuit Judge

APPENDIX E

U.S. Constitution: Amendment 5.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; **nor be deprived of life, liberty or property without due process of law**; nor shall private property be taken for public use without just compensation (emphasis added).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 188

SCHERER & SONS, INC., a Florida corporation
Petitioner

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, LOCAL No. 415, AFL-CIO, and FLORIDA APPAREL MANUFACTURERS' ASSOCIATION, INC., a Florida corporation

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF UNION IN OPPOSITION

MORRIS P. GLUSHIEN
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 188

SCHERER & SONS, INC., a Florida corporation
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v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, LOCAL NO. 415, AFL-CIO, and FLORIDA APPAREL MANUFACTURERS' ASSOCIATION, INC., a Florida corporation

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF UNION IN OPPOSITION

Opinions Below

The opinion of the court below (App. 1)* is reported in 341 F. 2d 298. The findings of fact, con-

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* References to the Appendix annexed to the Petition are cited "App. ", while references to the Record are cited "R. ".

clusions of law, and judgment of the district court (R. 557-564) are not officially reported.

Jurisdiction

The judgment of the court below was entered on February 15, 1965 (App. 2). A petition for rehearing was denied on March 19, 1965 (App. 3). The petition for a writ of certiorari was filed on May 27, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Question Presented

Whether a provision in an apparel industry collective bargaining agreement forbidding non-union subcontracting, desired by the union and opposed by the employers, and secured by the union over the employers' objections in order to protect the wages, standards and job security of the workers the union represents, violates the antitrust laws.

Statutes Involved

The statutory provisions involved are the Sherman Act, 15 U.S.C. § 1 *et seq.* (1958 ed.); Sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17, 29 U.S.C. § 52 (1958 ed.); the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* (1958 ed.); and Section 8 (e) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 158 (e) (1958 ed.).

Statement

The district court's findings of fact (R. 557-563), sustained by the court below (App. 1, 3), and virtually unchallenged by the Petition,[1] show the following:

In 1957, Local 415 of the International Ladies' Garment Workers' Union, AFL-CIO (the Union), entered into a traditional three-year collective bargaining agreement with the Florida Apparel Manufacturers' Association (R. 559). The Association then contained about 30 members who manufactured ladies' apparel in the Miami area (R. 559).

The 1957 agreement contained among other things limitations on subcontracting by Association members, requiring that such subcontracted work be made in union shops (R. 559-560).

In 1960, when the agreement was about to expire, the Union presented some 17 demands to the Association (R. 79, 560, Def. Ex. 3). The list covered improvements in wages and other standards. Included in this list was Item #12 which stated (R. 260):

> "All accessories, including but not limited to, belts, buttons, and embroidery to be made under Union conditions".

This item is the precursor of Paragraph 6 of the Supplemental Agreement, hereinafter mentioned, which gave rise to the instant case.

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[1] The Petition does assert that the findings "are clearly erroneous" (Pet. 12), but makes no effort to document this naked and wholly inaccurate *ipse dixit*.

The Association members vigorously resisted the demands of the Union on the ground that their labor costs were already much higher than those of their non-union competitors in the Miami area (R. 561). These non-union firms outnumbered the Association shops more than five to one (R. 11-12, 121-122).[2]

Among the Union demands to which the Association members strongly objected was Item #12 (R. 80-81) but the Union "insisted and absolutely demanded that this be met * * * [and] would not negotiate on any other terms unless first this comes to a complete understanding" (R. 81).

The reason for the Union's strong desire to insert a clause like this in the new contract was, as stated by the Union's principal negotiator, "to protect the standards and conditions of our members in the Miami market" (R. 265). During the first contract, from 1957 to 1960, disagreements had arisen concerning the proper scope of the limitations on subcontracting contained in that agreement (R. 560). To make clear that these limitations also pertained to accessories, belts and the like, the Union's negotiator proposed and insisted on Item #12 (R. 560).

The Association after lengthy negotiations finally capitulated and agreed to the inclusion in the renewal agreement of the Union's demand regarding this matter. The final clause was drafted by the Union (R. 262-263, 562) and became Paragraph 6 of the

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[2] The number of Association firms had dwindled to about 17 or 20 (R. 12, 122). There were between 100 and 200 non-union shops (*ibid.*).

Supplemental Agreement dated October 25, 1960, reading as follows (R. 336, 561-562):

> "6. Belts, covered buttons, buckles, neckwear, artificial flowers, embroideries, hemstitching, pleating and tucking on garments, etc., which are caused by members of the Association to be manufactured for them shall be made only by workers covered by collective bargaining agreements with the Union, the International or affiliates thereof. In case a member of the Association shall have this work done by a non-union shop, then, upon notification by the Union of this fact, the Employer shall discontinue to give out such work to such non-union shop or shops."

Petitioner is a non-union manufacturer of belts, buttons and accessories (R. 558). After the Supplemental Agreement took effect, some Association members nevertheless continued to subcontract belt and accessory work to petitioner (R. 562). The Union thereupon threatened to invoke the agreement against such members if they continued this practice (R. 245-247, 562). This effort of the Union to secure compliance with the agreement was countered by a suit in the Florida state courts initiated by petitioner under the state antitrust statutes, Florida Statutes, Section 542.05 (R. 214). Petitioner secured an injunction against the attempted enforcement of Paragraph 6 which remained in effect until it was vacated by the Florida Supreme Court in September 1962, 142 So. 2d 290.[3]

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[3] The court held that the subject matter of the suit under the state antitrust statute was preempted by the National Labor Relations Act. It remanded the case to the lower court, however, to determine whether relief should be granted under the Florida

Thereupon the Union in October 1962 again attempted to enforce Paragraph 6 (R. 214, 562). This time petitioner started the instant antitrust suit in the federal district court on October 22, 1962 (R. 291).

The cause proceeded to trial before the court sitting without a jury on the single issue, *viz.* (R. 409):

> "* * * whether the Local Union, by entering into Paragraph 6 of the Supplemental Agreement of October 26, 1960, or by other acts and conduct, aided and abetted the members of the Defendant, Florida Apparel Manufacturers Association, Inc., in the latter's alleged conspiracy to stifle competition and restrain trade in the manufacture, sale, use or consumption of merchandise."

After trial, the court on March 2, 1964, entered its findings of fact and conclusions of law as aforestated (R. 557-563). In addition to the findings already set forth, it found that the employer members of the Association never sought to enforce Paragraph 6; and that Paragraph 6 did not effect either price fixing, the elimination of competition, or other results prohibited by the Sherman Act (R. 563). The court concluded

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right-to-work amendment. After certain intermediate proceedings (see 163 So. 2d 306), the lower state court recently again enjoined enforcement of Paragraph 6 on the basis of the right-to-work amendment (App. 7-14). The Union has appealed from this decision.

Petitioner also filed unfair labor practice charges against the Union before the National Labor Relations Board, based on the execution and attempted enforcement of Paragraph 6. The charges were dismissed by the NLRB Regional Office, and affirmed on appeal to the NLRB General Counsel, on the ground that Section 8(e) of the National Labor Relations Act expressly authorizes the challenged provision. See the relevant papers made part of petitioner's reply brief in the court below and certified to this Court at petitioner's instance (Pet. 2).

that petitioner had not shown that the purpose or result of Paragraph 6 or of other acts or conduct of the defendants constituted an unlawful restraint of commerce within the antitrust laws; and it thereupon dismissed the complaint (R. 563-564).

The court below affirmed the judgment on February 15, 1965 (App. 2), and denied rehearing on March 19, 1965 (App. 3).

ARGUMENT

1. Thrashing about to strike down Paragraph 6, a traditional and lawful apparel industry contractual provision forbidding non-union subcontracting, petitioner has resorted as shown (*supra,* pp. 5, 6 and fn. 3) to a state court antitrust suit, a state court right-to-work suit, Labor Board unfair labor practice charges, and the instant suit under the Sherman Act. The courts below have rejected petitioner's Sherman Act claim as void of merit and there are no grounds warranting review.

As found by the trial court, Paragraph 6 was devised, insisted upon and obtained by the Union in its self-interest over the strong objections of the employers. It serves only Union ends, *viz.,* protection of the wages, standards and job security of the Union workers against displacement by workers operating under substandard non-union conditions. The Association employers would dearly love to be able to subcontract to lower-standard non-union shops, and as the trial court found (R. 563) at no time have the employers

sought to enforce Paragraph 6. It is only the Union which has attempted to do so.

In short, we have here a classic instance of the kind referred to in *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 503-504 (1940)—that union activity to be successful "must eliminate the competition from non-union made goods."

It is no surprise that petitioner has ignored *Apex* here and in its principal brief below. For in light of *Apex,* petitioner's effort to base an antitrust complaint on the Union's success in achieving and invoking a restriction on non-union production by Union firms approaches the fantastic.

Nor is there the slightest basis for petitioner's claim of conflict (Pet. 22) with *Allen Bradley Co.* v. *Local 3, IBEW,* 325 U.S. 797 (1940) and *U.S.* v. *Women's Sportswear Mfrs. Assn.,* 336 U.S. 460 (1949). In *Allen Bradley,* unlike the case at bar, a union aided a conspiracy of business men to achieve *their* unlawful objectives of price and market control. The Court assumed that the collective agreement "standing alone would not have violated the Sherman Act" (p. 809). And *Women's Sportswear* likewise involved a conspiracy by business men "to restrict competition and to control prices and markets" (p. 463). There was no union participation whatever. The Court pointed out that the business men had belatedly incorporated so-called labor provisions as a blind or facade which "seem to give nothing to labor that it was not already getting for itself" from its existing collective bargaining agreements (p. 464). The clear implication is that these collective agreements containing contracting-out

restrictions which the union had "already [gotten] for itself" and which did "give [something] to labor" were lawful.

In sum, there is no semblance of conflict with either decision.

2. If there could otherwise be any doubt that the case at bar was correctly decided, it is dispelled by Section 8(e) of the National Labor Relations Act added in 1959. As petitioner appears to recognize (Pet. 8, 17-18, 20, 23), this section explicitly authoriezs and legalizes a provision like Paragraph 6 in the Apparel and Clothing Industry. And when Congress has expressly declared such a provision to be in accord with national labor policy, and necessary to protect wages, hours and working conditions in this notoriously sweatshop industry, it certainly cannot be deemed to violate the Sherman Act. *Meat Cutters Union* v. *Jewel Tea Co.*, U.S. (1965); see also *Timken Roller Bearing Co.*, 70 NLRB 500, 518 (1946) (restrictions on subcontracting a mandatory subject of collective bargaining), reversed on other grounds, 161 F. 2d 949 (C.A. 6, 1949), cited with approval in *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283, 295 (1959), and in *Jewel Tea, supra; United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

Petitioner asserts that Section 8(e) is unconstitutional (Pet. 8, 17-18, 20-22, 23) but offers no reason or support for this claim. The three circuits which have had occasion to consider the issue have all held Section 8(e) to be constitutional, *Employing Lithographers of Greater Miami* v. *NLRB*, 301 F. 2d 20

(C.A. 5, 1962); *NLRB* v. *Amalgamated Lithographers of America,* 309 F. 2d 31 (C.A. 9, 1962), cert. den. 372 U.S. 943 (1963); *Truck Drivers Local No. 413* v. *NLRB,* 334 F. 2d 539 (C.A.D.C. 1964), and there are no contrary decisions.

CONCLUSION

The decision below is correct. It presents neither a conflict of decision, nor any question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

(October Term 1965)

No. 188

SCHERER & SONS, INC.,
a Florida corporation,

Petitioner,

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, LOCAL NO. 415, AFL-CIO,
and FLORIDA APPAREL MANUFACTURERS' ASSOCIATION, INC.,
a Florida corporation,

Respondents.

REPLY TO THE "BRIEF OF UNION IN OPPOSITION"

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SUPPLEMENTAL ARGUMENT

The petitioner, SCHERER & SONS, INC., in accordance with the provisions of Rule 24(4), files this, its Reply to The "Brief Of Union In Opposition" to the Petition for Writ of Certiorari, and says:

The Union, in its brief, not only sloughs off/over the matters and things set out in the Petition for Writ of Certiorari, but, completely ignores the accusation, in addition to the many other indictments contained in the Petition, including, but not limited to the illegality or paragraph 6 (R: 336) of the Supplemental Agreement (R: 332-337), augmenting the original Agreement, that the original Agreement (R: 307-332) dated July 16, 1957, always had in effect at all times material since September 1, 1957, (R: 331) a "*most favored nation clause*", Article XXXIII (R: 330) which provided, in words and phrases, the following:

> **ARTICLE XXXIII: CONTRACTS WITH OTHER EMPLOYERS**
>
> **"In order to carry out the spirit of this agreement, the Union agrees that no more favorable terms or conditions than are provided for herein will hereafter be granted by the Union to any employers not members of the Association. The Union will exhibit to the Association, upon its written request the Union's contracts with such other employers."**

and the Union's regional director, Kehrer, during the trial of this cause, stated that this *Local (Union) would not sign up others except on the terms insisted upon by the Association pursuant to the most favorad nation provision.* (R: 277; P: 17*) Moreover, this same Kehrer stated, that it was one of the Association's contentions that the only reason they/it executed either this or the Supplemental Agreement was because of the Union's agreement to or-

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ganize (R:275). He even admitted that **organization** was a two-day bargaining session discussion in the negotiating of the Supplemental Agreement in connection with the enforcement of Article XXXIII, supra.

With regard to the above, the Union disregards or fails to call attention to the cases of **United Mine Workers of America, Petitioner,** versus **James M. Pennington, et al.** (1965), 85 S. Ct. 1585, and **Local Union No. 189, Amalgamated Meat Cutters, etc.** versus **Jewel Tea Company** (1965) 85 S. Ct. 1596. In the **Pennington** case the basic issue was whether the union could enter into a collective bargaining agreement with a multi-party bargaining unit regarding wages and, as a part of that agreement, undertake to impose the same standards on other small producers without regard to their ability to pay (the instant case). Mr. Justice White stated that the anti-trust laws applied to a conspiracy of employers and the union to eliminate competition based on sub-standard wages; the concurring opinion of Mr. Justice Douglas went even beyond the Mr. Justice White opinion. In Mr. Justice White's opinion he reasoned that a group of employers could not conspire to eliminate competitors, and the union was liable if it joined the conspiracy even though the union's part was to impose uniform wages on all the industry, and this opinion extends even the **Allen Bradley** decision.[1] In the case at bar the facts reveal that the Union and the Association mutually joined together in a conspiracy far exceeding the requirements of either the **Pennington, Allen Bradley** or the **Jewel Tea Company** cases(s), supra. The net result seems to be that an industry-wide agreement by union and employers setting

[1]Allen Bradley v. Local 3, International Brotherhood of Electrical Workers, (1945) 325 U. S. 797, 65 S. Ct. 1533.

up a wage structure beyond the financial ability of marginal employers to pay and made to force marginal employers out of business is in itself a **prima facie** violation of the anti-trust laws. (In this connection see also P: 17, and the petitioner's briefs and the Petition for Rehearing filed in the appeal before the Court of Appeals for the Fifth Circuit.)

It would seem from the **Jewel Tea Company** case (and, of course, the **Pennington** case), that any discussions, even at the bargaining table, about the competitive impact of wages on other employers in the industry is itself evidence of a conspiracy subjecting companies i.e. Association and Unions alike, to treble damages in criminal and civil sanctions (in this connection see the record pages 262-278).

As for the exemption granted this Union by Section 8(e) of the National Labor Relations Act, which said Section was added in 1959 and can hardly be said to be sweat shop if only in view of the existence of the Fair Labor Standards Act, it is but necessary to point out that two of the Union's citations[2] in support of its position are based solely upon the case of **Employing Lithographers of Greater Miami** versus **National Labor Relations Board, 301 F. 2d. 20 (C. A. 5, 1962)** which petitioner has discussed, at great length, in the Petition for Writ (P: 21-22); not only was a ruling on the constitutionality of this exemption or, more specifically a determination of the illegality of proviso/exemption granted the garment workers in 8(e), unnecessary to a determination of

[2]NLRB v. Amalgamated Lithographers of America, 309 F. 2d 31 (C. A. 9, 1962) cert. den. 372 U. S. 943 (1963); Truck Drivers Local No. 413 v. NLRB, 334 F. 2d 539 (C. A. D. C. 1964).

the issues involved in these three cases (as the Court obviously recognized in the **Employing Lithographers** cases, supra, by the use of its words "in the meantime") but most importantly the Court was no confronted, as in this case, *with a head-on collision where am "employer" directly is denied guaranteed constitutional rights* **in a confiscatory manner in violation of due process.** Moreover in the light of the **Pennington** and **Jewel Tea** cases, supra, to hold that this exemptive proviso does not clash head on with the anti-trust laws would do violence to **reason.**

SUPPLEMENTAL CONCLUSION

The petitioner concludes, as it did in the first instance (P: 24) and requests oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Reply to the "Brief of Union in Opposition" was mailed to each of the following this 31 day of August, 1965:

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